IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

95-992

RECEIVED
HAND DELIVERED
DEC 21 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TURNER BROADCASTING SYSTEM, INC., et al.,

Movants-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

MOTION TO EXPEDITE

Movants are cable television programmers and operators who have today filed a jurisdictional statement seeking review of the decision of the three-judge district court rendered on remand from this Court's decision in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994) ("Turner I"). Pursuant to this Court's Rule 21, movants hereby request that this Court direct any response to the jurisdictional statement to be filed by January 8, 1996, and that the Court take up this case at its conference on January 19, 1996. The purpose of the motion is to enable the case to be heard and decided in the current Term of the Court. Plenary review is plainly appropriate in this case; the essentially legal issues presented by the case are readily capable of resolution this Term; and delaying resolution until next Term would impose substantial costs and uncertainty on the cable and broadcast industries and the public they serve.

STATEMENT

This case involves the validity under the First and Fifth Amendments of the "must carry" statute, enacted in 1992, to force cable operators to carry local broadcast stations in preference to other programmers seeking access to scarce space on cable systems. 47 U.S.C. §§ 534, 535.[1] Challenges to the provisions were immediately brought in a three-judge district court specially convened pursuant to Congress's directive for expeditious adjudication of the constitutional issues. 47 U.S.C. § 555(c)(1). The three-judge court, by a 2-1 vote (with Judge Williams dissenting), upheld the statute. Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993).

This Court, on a direct appeal pursuant to 28 U.S.C. § 1253, held that the "District Court erred in granting summary judgment in favor of the Government," which had not justified the statute under the applicable First Amendment standards. Turner I, 114 S. Ct. at 2472 (plurality). Although four Justices concluded that the law failed under strict scrutiny (114 S. Ct. at 2475 (O'Connor, J., dissenting)), five Justices concluded that intermediate-scrutiny applied (114 S. Ct. at 2469). With Justice Stevens concurring in the judgment (114 S. Ct. at 2473-75), the case was remanded "because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties

[1] These provisions are described in Turner I, 114 S. Ct. at 2452-54, and are set forth in Appendix B to the accompanying jurisdictional statement.

contend are to be drawn from the statistics and other evidence presented." 114 S. Ct. at 2472 (plurality). The plurality explained the focus of the inquiry on remand: "we must first ask whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" 114 S. Ct. at 2470. Because the four Justices in the plurality were "unable to conclude that the Government has satisifed either inquiry" (ibid.),[2] the case was sent back "to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual dispute remaining, before passing upon the constitutional validity of the challenged provisions." Id. at 2472.

On remand, the three-judge district court directed that the case be resolved expeditiously, ordering all discovery and briefing to be completed by June 30, 1995. Turner Broadcasting System, Inc. v. FCC, No. 92-2247 et al. (D.D.C. Dec. 2, 1994) (scheduling order). The understood object was to have the case decided in time for any appeal to be taken to, and resolved by, this Court during the October 1995 Term. See Oral Argument Tr.

[2] Three of the dissenting Justices also concluded that the Government had failed to meet the standard of intermediate scrutiny. 114 S. Ct. at 2479-80 (O'Connor, J., dissenting).

(July 17, 1995) (Judge Williams) ("I understand -- basically, you all want to get it on as fast as possible to the people who are really going to decide it. . . . And I share in the impulse."); Government Motion to Extend Briefing Schedule at 8 (Nov. 28, 1994) ("Defendants also recognize, however, this Court's direction to resolve this case with dispatch."); Transcript of Conference before Special Master James R. Miller, Jr., at 68 (Dec. 21, 1994) ("my understanding is that my mission and your mission is to get everything done, period . . . prior to June 30").

On December 12, 1995, the three-judge district court entered its Memorandum and Order on remand, upholding the statute with each of the three judges reaching a different a conclusion about the issues. Turner Broadcasting System, Inc. v. FCC, No. 92-2247 ("Turner II"), reprinted at pages 1a-112a of the appendix to the accompanying jurisdictional statement. Judge Sporkin concluded that the Government had met its burden. J.S. App. 1a-32a. Judge Williams concluded that the Government had not. J.S. App. 38a-112a. Judge Jackson concluded that neither party was entitled to summary judgment and that the case should be set for trial, but in order not to "prevail by stalemate," he voted to concur in Judge Sporkin's holding. J.S. App. 33a; id. at 33a-37a.

Appellants have filed a notice of appeal and jurisdictional statement seeking plenary review of the district court's holding. As provided for by Congress (47 U.S.C. § 555(c)(1)), this direct appeal, like the first appeal in 1993, is brought under 28 U.S.C.

§ 1253, whose purpose is to provide "a means of accelerating a final determination on the merits." Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 96 (1974); see also United Public Workers of America v. Mitchell, 330 U.S. 75, 86 (1947) ("direct appeal accomplishes the Congressional purpose of expediting review"). There is no reason to expect any other appeals or any cross-appeals to be filed in this case.

REASONS FOR GRANTING THE MOTION

The requested expedition of this Court's decision whether to note probable jurisdiction in this case -- providing for that decision to be made at the Court's January 19, 1996, conference, and thus allowing the case to be heard this Term -- is warranted. Had the district court rendered its decision several weeks ago, no special expedition would have been required to bring the case to the Court's conference on January 19, 1996. The several-week delay in the lower court's decision does not, in this case, justify the delay in final resolution, of six months or more, that could result from adhering to the otherwise-applicable schedule and putting off argument and decision until next Term.

First, the threshold determination to set the case for plenary briefing and argument is, we believe, a straightforward one under the established standards of the direct appeal statute. As the jurisdictional statement shows, the First Amendment issues presented are plainly substantial; and in light of their essentially legal (rather than factual) character, no extensive examination of the record in the case is required in order to

make the immediate determination that the case warrants full review (or, indeed, to see why the judgment should be reversed). See J.S. 11-20. Moreover, plenary review is peculiarly appropriate in this case because the important constitutional questions were resolved by a 2-1 vote, with Judge Jackson casting the deciding vote simply to avoid a "stalemate" and explaining that he did not actually think the Government entitled to this judgment. J.S. App. 33a. The judgment rejecting appellants' First Amendment challenge should not be allowed to stand without full consideration of this Court. In these circumstances, the threshold determination to accept the case for full briefing and argument does not require or justify taking the ordinary period for responses and consideration by this Court -- a period that would push the case out to the February 16, 1996, conference.[3]

Second, resolution of the case this Term is warranted to eliminate the grave uncertainty about must-carry rights caused by the fractured disposition of the three-judge district court. That uncertainty has immediate practical consequences. Notably, under governing law, broadcast stations must make their next round of elections between must-carry status and "retransmission consent" status before October 1996. 47 U.S.C. § 325(b)(3)(B); 47 C.F.R. § 76.64(f)(2). A decision this Term would enable

[3] If the Court declines to take up the case at its January 19, 1996, conference, and takes it up instead at the February 16, 1996, conference, appellants are prepared to file their briefs on the merits within 10 days -- thereby allowing appellees the full 30 days for their brief and enabling argument to be held at the April session.

broadcast stations, cable operators, and cable programmers seeking carriage to know in advance whether there is any election to be made. Similarly, the FCC is currently considering a dramatic expansion of must-carry obligations in its rulemaking proceeding on the future of digital broadcast systems, which would allow broadcasters to multiply the number of channels they now provide. Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry ¶ 82, 10 F.C.C.R. 10,540 (Aug. 9, 1995). Delaying resolution of this case would perpetuate the uncertainty about the validity of imposing must-carry obligations in that proceeding, where one Commissioner has suggested mandatory carriage of every free programming stream created by broadcasters. Id., Separate Statement of Commissioner Quello, at 1.[4]

Third, expeditious resolution is justified because there is no question that the statute at issue imposes a continuing burden on movants' speech interests protected by the First Amendment. Turner I, 114 S. Ct. at 2456.[5] Cable programmers and operators

[4] Final resolution of the status of must-carry would also affect the stream of must-carry petitions presented by broadcast stations to the FCC, which has so far adjudicated 270 of them. Television Digest, May 1, 1995, at 1.

[5] "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." 114 S. Ct. at 2456.

bore the burdens of the FCC's earlier regulatory must-carry requirements before they were struck down as unconstitutional in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). If the present appeal is not heard this Term, and if movants are correct that the Government has similarly failed to justify the new statutory must-carry requirement, cable programmers and operators will have spent roughly four more years under unconstitutionally imposed burdens on their freedom of speech. These burdens are palpably real and continuing: scarce capacity on cable systems, commandeered by law, is foreclosed to a substantial number of cable programmers, despite the editorial choices that otherwise would be made by cable operators.[6] The requested expedition would avoid an unnecessary and harmful delay of six months or more in this Court's determination whether, as movants contend, those burdens must constitutionally be lifted. See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

---

[6] According to appellees' own evidence, "must carry" broadcast stations accounted for 7% to 13% of cable channels, and half of all cable systems lacked any unused capacity (whose availability, in any event, is always temporary). J.S. App. 90a-91a, 93a (Williams, J., dissenting). In particular, movant Time Warner "added 240 broadcast stations to its systems because of must-carry and had to drop programming on 75 channels as a result." Id. at 93a. The basic facts of foreclosure are simple: it is undisputed that, "as of October 1994 an estimated 86% of cable systems had a maximum capacity of less than 54 channels," while "there are currently 128 national and 40 regional cable networks (i.e., programming channels available to cable systems)." Id. at 90a.